

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	File No. EB-02-AT-322
Barinowski Investment Company, LP	)	
Owner of Antenna Structure # 1062662 near	)	NAL/Acct. No. 200232480030
Savannah, Georgia	)	
Grovetown, Georgia	)	FRN 0006-1664-09
	)	

**FORFEITURE ORDER**

**Adopted: December 1, 2003**

**Released: December 3, 2003**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Forfeiture Order* ("Order"), we issue a monetary forfeiture in the amount of eight thousand dollars (\$8,000) to Barinowski Investment Company, LP ("Barinowski"), owner of antenna structure registration number 1062662 located near Savannah, Georgia, for willful violation of Section 17.50 of the Commission's Rules ("Rules").<sup>1</sup> The noted violation involves Barinowski's failure to clean and repaint its antenna structure to maintain good visibility.

2. On September 30, 2002, the Commission's Atlanta, Georgia Field Office ("Atlanta Office") issued a *Notice of Apparent Liability for Forfeiture* ("NAL")<sup>2</sup> in the amount of ten thousand dollars (\$10,000) to Barinowski. Barinowski filed a response on October 7, 2002.

**II. BACKGROUND**

3. On August 28, 2002, a Commission agent from the Atlanta Office inspected antenna structure registration number 1062662. At the time of the inspection, black cabling on the outside of all three sides of the structure covered the painted metal tower, reducing the visibility of the structure. On September 12, 2002, during a telephone interview with an agent from the Atlanta Office, a Barinowski representative stated that Barinowski owned antenna structure registration number 1062662, that it was aware that the cables affected the visibility of the antenna structure, and that it had contracted to have the

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<sup>1</sup> 47 C.F.R. § 17.50.

<sup>2</sup> *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232480030 (Enf. Bur., Atlanta Office, released September 30, 2002).

tower repainted as soon as an additional tenant was added to the structure. On September 30, 2002, the District Director of the Atlanta Office issued a *NAL* for \$10,000 to Barinowski for willfully violating Section 17.50 of the Rules. The *NAL* specifically noted that Barinowski failed to repaint the antenna structure in accordance with the painting specifications associated with it.

4. In its response Barinowski requests cancellation of the forfeiture. In support of its request, Barinowski states that it had been advised by its consultant, prior to any contact with the Commission agent, to paint the antenna structure as a preventive measure. Further, Barinowski states that it had already arranged for the tower to be painted and had prepaid the contractor on May 31, 2002 to expedite the painting.<sup>3</sup> Finally, Barinowski states that it believed that the antenna structure was not in violation and that the painting, which occurred on October 4, 2002, prevented a future violation.

### III. DISCUSSION

5. The proposed forfeiture amount in this case is being assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),<sup>4</sup> Section 1.80 of the Rules,<sup>5</sup> and *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”). In examining Barinowski’s response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.<sup>6</sup>

6. Section 17.50 of the Rules provides that antenna structures requiring painting under the rules shall be cleaned or repainted as often as necessary to maintain good visibility. Antenna structure registration number 1062662 has specified lighting and painting requirements that include painting the structure with alternating bands of aviation orange and white. Moreover, the antenna structure registration for Barinowski’s antenna structure registration number 1062662 requires it to comply with FAA Advisory Circular AC 70/7460-1J. This Advisory Circular, which is incorporated by reference to our rules in Section 17.23 of the Rules,<sup>7</sup> explicitly states that “alternative bands of aviation orange and white are normally displayed on ... coaxial cable, conduits and other cables attached to the face of a tower.”<sup>8</sup> Further, pursuant to Section 17.23 of the Rules, “the specifications, standards, and general requirements stated in [this Circular] are mandatory.” Thus, any cables attached to the face of

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<sup>3</sup> Barinowski includes a copy of an invoice for painting of the antenna structure, which is dated May 31, 2002.

<sup>4</sup> 47 U.S.C. § 503(b).

<sup>5</sup> 47 C.F.R. § 1.80.

<sup>6</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>7</sup> 47 C.F.R. § 17.23. This section requires conformity with the Advisory Circular for each new or altered structure to be registered on or after January 1, 1996.

<sup>8</sup> FAA Advisory Circular AC 70/7460-1J, Obstruction Marking and Lighting, Chapter 3, Marking Guidelines, Paragraph 33(c)(1)(g).

Barinowski's tower are required to be painted.<sup>9</sup> When the agent inspected the tower on August 28, 2002, he determined that the unpainted cables did, in fact, obscure the visibility of the tower in violation of Section 17.50 of the Rules. Contrary to Barinowski's contention, its delayed painting of the tower was not a measure taken to prevent a future violation of Section 17.50 because the condition of Barinowski's tower already violated Section 17.50 of the Rules. Because Barinowski knew its antenna structure needed to be painted, but made a conscious decision to wait to paint it, we find that its violation of Section 17.50 was willful.<sup>10</sup>

7. Finally, Barinowski asserts that its prior arrangement to have the tower painted renders the forfeiture unwarranted and, thus, it should be cancelled. We note that Barinowski contracted on May 31, 2002, prior to the inspection, to have the tower painted. The inspection was conducted on August 28, 2002 and, because Barinowski had made a business decision not to paint the tower until he acquired a new tenant, the tower still was not painted. The tower was not painted until October 4, 2002, at least four months after Barinowski contracted to have the tower painted. Although we do not believe that waiting four months to remedy such a serious safety hazard is an exercise of good faith sufficient to justify canceling the forfeiture, we do believe that identifying the need to repaint the tower, and pre-paying for the future painting of the tower prior to any notice of inspection or issuance of the *NAL* merits a reduction of the proposed forfeiture. We therefore reduce the forfeiture amount from ten thousand dollars (\$10,000) to eight thousand dollars (\$8,000) based on Barinowski's good faith efforts to comply with Section 17.50 of the Rules prior to being informed of the violation.<sup>11</sup>

8. We have examined Barinowski's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that Barinowski willfully violated Section 17.50 of the Rules. However, we also find that reduction of the proposed monetary forfeiture to \$8,000 is warranted.

#### IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED THAT**, pursuant to Section 503(b) of the Act and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,<sup>12</sup> Barinowski Investment Company, LP, **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand dollars (\$8,000) for willfully violating Section 17.50 of the Rules.

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<sup>9</sup> See *Pinnacle Towers, Inc.*, 18 FCC Rcd 6419, 6419-6420 (Enf. Bur. 2003).

<sup>10</sup> Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful,' ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act ...." See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

<sup>11</sup> See *Access.1 Communications Corp. – NY*, DA 03-3412 (Enf. Bur. released October 30, 2003) (good faith reduction given where tower owner identified the need to repaint the tower, scheduled the tower for repainting, and repainted the tower prior to any notice of inspections or issuance of the *NAL*).

<sup>12</sup> 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

10. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.<sup>13</sup> Payment shall be made by mailing a check or similar instrument, payable to the order of the "Federal Communications Commission," to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note NAL/Acct. No. 200232480030, and FRN 0006-1664-09. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.<sup>14</sup>

11. **IT IS FURTHER ORDERED** that, a copy of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Barinowski Investment Company, LP, 2278 Wortham Lane, Grovetown, GA 30813.

**FEDERAL COMMUNICATIONS COMMISSION**

David H. Solomon  
Chief, Enforcement Bureau

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<sup>13</sup> 47 U.S.C. § 504(a).

<sup>14</sup> See 47 C.F.R. § 1.1914.